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April 13, 2007

Ex Parte Communication

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20445

Re: <u>MB Docket No. 07-57</u>

Dear Ms. Dortch:

On April 12, 2007, the following parties met to discuss the above-captioned consolidated transfer applications of XM Satellite Radio Holdings, Inc. and Sirius Satellite Radio, Inc.:

- Joel Oxley, Senior Vice President, Bonneville International, and Marsha MacBride and Larry Walke of the National Association of Broadcasters ("NAB") met with Commissioner Deborah Taylor Tate and Christopher Robbins;
- Marsha MacBride and Larry Walke of NAB met with Helen Dominici, Roderick Porter, Gardner Foster, Robert Nelson and Stephen Duall of the International Bureau; and
- Jane Mago and Larry Walke of NAB met with Monica Desai, Rosemary Harold, Sarah Whitesell and William Freedman of the Media Bureau.

We expressed our concerns that the proposed merger-to-monopoly will harm consumers, undermine fair competition in local radio markets, and violate the Commission's long-standing prohibition against a merger of the nation's only two satellite radio licensees. We also cautioned against the creation of a regulated satellite radio monopoly subject to conditions, given the applicants' record of violations of the Commission's rules.

The attached documents were distributed at these meetings. Please direct any questions concerning this matter to the undersigned.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036

Larry Walke

Attachments

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MEMORANDUM
February 23, 2007

To: David K. Rehr
President, National Association of Broadcasters

From: David H. Solomon[1] DHS

Re: FCC-Related Concerns Raised by XM Radio/Sirius Merger

I. INTRODUCTION AND SUMMARY

Per your request, this memorandum outlines Federal Communications Commission ("FCC" or "Commission")-related concerns raised by the contemplated merger of XM Radio Inc. ("XM Radio") and Sirius Satellite Radio Inc. ("Sirius"), in which they would consolidate their satellite digital audio radio service ("satellite DARS") licenses.

Allowing XM Radio and Sirius to merge would create a satellite DARS monopoly. The combined entity would be the only company in the United States with the ability to provide a nationwide, multi-channel mobile audio programming service. Such a combination would be contrary to an explicit FCC prohibition and decades of Commission policy regarding competition. Indeed, such a government-created national media monopoly would be unique in the history of the Commission.

Consumers would likely suffer directly from the creation of a satellite DARS monopoly. With no competitors offering nationwide, mobile audio service, a satellite DARS monopolist would be able to raise consumer prices, while at the same time reducing programming choices.

In addition, XM Radio and Sirius have engaged in a pattern of significant FCC rule violations, relating to receiver interoperability, receiver interference and terrestrial repeater technical rules. These violations raise serious questions regarding whether the companies can be

[1] Partner, Wilkinson Barker Knauer, LLP; former Chief, FCC Enforcement Bureau and former FCC Deputy General Counsel.

relied on to comply in the future with FCC rules or with any condition the companies may propose or accept to achieve monopoly status.

II. BACKGROUND: APPLICABLE FCC LEGAL STANDARDS

Under section 310(d) of the Communications Act, before granting authority for the license transfers that accompany the XM Radio/Sirius merger, the Commission must determine that "the public interest, convenience, and necessity will be served thereby."[2] If it cannot do so, or if there are "substantial and material questions of fact" regarding the application, it must designate the application for an adjudicatory hearing.[3]

The Commission has described its application of the public interest, convenience and necessity standard in the merger context as follows:

> In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the potential public interest benefits.[4]

The burden of proof, by a preponderance of the evidence, is on the merger applicants.[5] With respect to the threshold issue of violation of a statute or rule, the proposed merger would violate the FCC's satellite DARS anti-merger rule.[6]

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[2] 47 U.S.C. § 310(d).

[3] 47 U.S.C. §§ 308, 309(a), (d), & 310(d).

[4] *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18300 ¶ 16 (2005) ("*SBC/AT&T Merger Order*"). The Commission has articulated the same standard in numerous other cases. *See, e.g., id.* at nn. 60-62; *EchoStar Communications Corp.*, 17 FCC Rcd 20559, 20574 ¶ 25 (2002) ("*EchoStar/DirecTV Merger Order*").

[5] *SBC/AT&T Merger Order*, 20 FCC Rcd at 18300 ¶ 16; *see also EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20574 ¶ 25.

[6] *See infra* at 4.

With respect to the Commission's public interest analysis, a key aspect is the impact of the transaction on competition. The Commission's competition analysis is broad; it is "informed by, but not limited to, traditional antitrust principles."[7] Under antitrust principles, as the Commission recognized in declining to approve the proposed EchoStar/DirecTV merger of the two national Direct Broadcast Satellite ("DBS") licensees, "courts have generally condemned mergers that result in duopoly, and have been even more hostile to those that result in monopoly."[8] Where, as here, "a merger is likely to result in a significant reduction in the number of competitors and a substantial increase in concentration, antitrust authorities generally require the parties to demonstrate that there exist countervailing, *extraordinarily large*, cognizable, and non-speculative efficiencies that are likely to result from the merger."[9]

III. CREATING A MONOPOLY WOULD UNDERMINE COMPETITION

As the Commission recognized in establishing the service, satellite DARS, as a national service, differs from local commercial radio in significant respects:

> [S]atellite DARS can provide new services that local radio inherently cannot provide. With its national reach, satellite DARS could provide continuous radio service to the long-distance motoring public, persons living in remote areas, and may offer new forms of emergency services.[10]

The Commission sought to "create as competitive a market structure as possible, while permitting each DARS provider to offer sufficient channels for a viable service."[11] While the Commission expressed concern that "spectrum constraints limit us to licensing just two satellite DARS systems at this time," it concluded that assigning licenses to two different entities was sufficient to "provide[] the opportunity for a competitive DARS service."[12]

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[7] *SBC AT&T Merger Order,* 20 FCC Rcd at 18302 ¶ 18; *see also EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20575 ¶ 27.

[8] *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20604 ¶ 100.

[9] *Id.* at ¶ 102 (emphasis added).

[10] *Establishing Rules and Policies for the Digital Audio Radio Satellite Service,* 12 FCC Rcd 5754, 5760-61 ¶ 13 (1997) ("*Satellite DARS Report & Order*").

[11] *Id.* at 5786 ¶ 77.

[12] *Id.*

In deciding to have two different licensees, the Commission focused on the benefits to consumers: "Licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of program voices."[13] As the Commission later explained, the decision to reject a satellite DARS monopoly (as well as to reject a cellular radio monopoly) was part of a "long-standing policy of promoting competition in the delivery of spectrum-based communications services," which it carried out specifically through "a long history of establishing spectrum-based commercial services with no fewer than two participants per service, with the aim of creating competitive markets. . . ."[14] This preference for competition over monopoly also lies at the core of the Telecommunications Act of 1996 ("1996 Act"), whose formal title is "An Act [to] promote competition and reduce regulation . . . ."[15]

It would, of course, be entirely inconsistent with the pro-competitive DARS scheme established by the Commission to permit the two licensees to combine into a monopoly enterprise. To ensure future competition, the Commission explicitly prohibited any such merger:

> Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellite DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite DARS service.[16]

The Commission contemporaneously published this requirement in the Federal Register, which gave it binding legal effect as an "uncodified" substantive rule.[17]

To allow the two satellite DARS licensees to merge in order to create a satellite DARS monopoly not only would be inconsistent with the anti-merger rule and the entire competitive satellite DARS scheme designed by the Commission, but would also be inconsistent with decades of Commission precedent and congressional policy favoring competition over monopoly.

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[13] *Id.* at ¶ 78.

[14] *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20598, 20662 ¶¶ 88, 277.

[15] Pub. L. No. 104, 110 Stat. 56 (1996). *See also* S. Conf. Rep. No. 230, 104th Cong. 2d Sess. 1 (1996) (the 1996 Act provides for a "pro-competitive, de-regulatory national policy framework").

[16] *Satellite DARS Report & Order*, 12 FCC Rcd at 5823 ¶ 170.

[17] 62 Fed. Reg. 11083, 11102 (March 11, 1997). *See Appalachian Power Co. v. Train*, 566 F.2d 451, 455 (4th Cir. 1977); *AT&T Corp.,* 11 FCC Rcd 3271, 3352 ¶ 151 (1995); *Nelson Broadcasting Corp.,* 6 FCC Rcd 1765 ¶¶ 3-4 (1991).

Indeed, the Commission previously refused to permit a merger of the only two nationwide DBS licensees. In doing so, the Commission found:

> We are concerned that ownership of all satellites in the full-CONUS orbital location by one entity . . . could likely undermine our goals of increased and fair competition in the provision of DBS service. We are also concerned that the claimed benefits of efficient and expeditious use of spectrum are outweighed by the potential harms associated with the concentration of ownership of key DBS spectrum licenses in a single licensee.[18]
>
> * * * *
>
> [T]he record indicates that substantial potential public interest harms may result from the transaction . . . . The record before us irrefutably demonstrates that the proposed transaction would eliminate a current viable competitor from every market in the country . . . . Perhaps most significantly, each [company] holds licenses for approximately half the total orbital slots that allow broadcast to the entire continental United States – licenses they seek in this proceeding to transfer to a single new entity. . . . [C]ase law under the antitrust laws is generally quite hostile to proposed mergers that would have these impacts on the competitive structure, because such mergers are likely to increase the incentive and ability to engage in anticompetitive conduct. . . .
>
> The Applicants have cited no example where we have permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service.[19]

For precisely the same reasons, XM Radio and Sirius should not be permitted to create a nationwide satellite DARS monopoly. A merger here would be particularly problemmatic given that satellite DARS is in its early stages of development. XM Radio and Sirius both began satellite DARS service just over five years ago.

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[18] *EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20562 ¶ 3.

[19] *Id.* at 20661-62 ¶¶ 275-77.

IV. CONSUMERS WOULD SUFFER FROM A SATELLITE DARS MONOPOLY

Competition is not a goal in and of itself but is a means to serving consumers. As recognized by Congress in the title of the 1996 Act, competition and deregulation "secure lower prices and higher quality services for American telecommunications consumers . . . ."[20] Consistent with this, in creating a competitive market structure for satellite DARS, as noted above, the Commission explicitly focused on the benefits to consumers: "Licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of program voices."[21]

Using conditions to counter the effect on rates caused by eliminating competition would not, under FCC precedent, be an appropriate solution to the consumer harm caused by creation of a satellite DARS monopoly. As the Commission said in the closely analogous context of an EchoStar/DirecTV merger pricing proposal:

> [E]ven if the national pricing plan were likely to be an effective competitive safeguard, its implementation would not be consistent with the Communications Act or with our overall policy goals. In essence, what Applicants propose is that we approve the replacement of viable facilities-based competition with regulation. This can hardly be said to be consistent with either the Communications Act or with contemporary regulatory policy and goals, all of which aim at replacing, wherever possible, the regulatory safeguards needed to ensure consumer welfare in communications markets served by a single provider, with free market competition, and particularly with *facilities-based* competition. Simply stated, the Applicants' proposed remedy is the antithesis of the 1996 Act's "pro-competitive, de-regulatory" policy direction. The merger would . . . totally eliminate what appears to be a very healthy level of intramodal competition among the two facilities-based DBS providers.[22]

A satellite DARS monopolist as the single entry point for nationwide mobile audio programming could also reduce program diversity. As explained by the Commission,

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[20] Pub. L. No. 104, 110 Stat. 56 (1996).

[21] *Satellite DARS Report & Order*, 12 FCC Rcd at 5786 ¶ 78.

[22] *EchoStar/DirecTV Merger Order,* 17 FCC Rcd at 20663 ¶ 282 (emphasis in original).

competition will further program diversity in the satellite DARS market much more effectively than a monopoly:

> We believe that licensees will have an incentive to diversify program formats and thereby provide valuable niche programming. We recognize that satellite DARS licensees are likely to provide the programming that is most profitable. Nonetheless, given that we anticipate each satellite DARS licensee will control more than 20 channels, each licensee will have an incentive to diversify programming so that one channel will not directly compete with another channel that the licensee itself controls. We have noted the importance of this incentive, particularly with respect to entertainment programming, in other proceedings.[23]

Customers could also suffer from technical incompatibility problems caused by the merger. For example, the receivers used by one company are not compatible with the other company's system, so consumers might need to purchase new receivers as a result of the merger.

V. XM RADIO AND SIRIUS HAVE ENGAGED IN RULE VIOLATIONS THAT RAISE SERIOUS QUESTIONS WHETHER THEY CAN BE RELIED ON TO COMPLY WITH FCC RULES OR CONDITIONS

As part of the public interest analysis related to a merger application, the Commission considers whether both applicants have the requisite "character" qualifications to hold Commission licenses, with particular focus on the character qualifications of the transferee.[24] With respect to FCC-related misconduct, the Commission "has stated that it would treat any violation of any provision of the Act, or of the Commission's rules, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications."[25] Both XM Radio and Sirius have engaged in significant violations of FCC rules such that serious questions arise regarding whether they can be relied on to comply in the future with FCC rules or any conditions that might be imposed as part of the merger.

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[23] *Satellite DARS Report & Order,* 12 FCC Rcd at 5762 ¶ 15.

[24] *SBC/AT&T Merger Order*, 20 FCC Rcd at 18379 ¶ 171; *see also EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20576 ¶ 28.

[25] *SBC/AT&T Merger Order*, 20 FCC Rcd at 18379 ¶ 172; *see also EchoStar/DirecTV Merger Order*, 17 FCC Rcd at 20576 ¶ 28.

First, both XM Radio and Sirius have violated an FCC rule that each of their satellite DARS systems "includes a receiver that will permit end users to access all licensed satellite DARS systems that are operational or under construction."[26] While the Commission declined to mandate receiver standards, it said that, "at the very least, consumers should be able to access the services from all licensed satellite DARS systems and our rule on receiver interoperability accomplishes this."[27] The purposes of this rule included "promot[ing] competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers."[28] While both companies certified nearly 10 years ago that they would comply with this pro-competition, pro-consumer requirement, they have not done so.[29] Their systems do not currently "include" such an interoperable receiver.

Second, both XM Radio and Sirius have violated FCC equipment rules designed to ensure that their receivers do not interfere with broadcast radio stations.[30] As a result, as has been widely reported, listeners to religious and other non-commercial radio stations may not only receive interference, but may receive "signal bleed" that results in their unintentionally hearing on their car broadcast radios such programming as *The Howard Stern Show*.[31] The Commission is investigating this matter.

Third, both XM Radio and Sirius have admittedly violated FCC technical rules in connection with special temporary authority to use terrestrial repeaters. XM Radio, for example, has operated more than 221 terrestrial repeaters at unlawful power levels. It has also operated more than 142 repeaters at unauthorized locations and 19 repeaters with no authorization whatsoever. In fact, just two weeks ago, the Commission reportedly sent a letter of inquiry to

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[26] 47 C.F.R. § 25.144(a)(3)(ii).

[27] *Satellite DARS Report & Order,* 12 FCC Rcd at 5797 ¶ 106.

[28] *Id.* at 5796 ¶ 103.

[29] *See* XM Satellite Radio Holdings Inc. SEC Form 10-K at 11 (March 3, 2006) (stating that XM Radio and Sirius are "jointly developing" a common receiver platform); Sirius Satellite Radio Inc. SEC Form 10-K at 9 (March 13, 2006) (technology for a unified receiver standard "is being developed" with XM but "we have no assurances that any manufacturer will build . . . such dual-mode radios."). The companies claim in their Form 10-Ks that they have complied with the rule notwithstanding the fact that they do not offer – and have never offered – an interoperable receiver.

[30] 47 C.F.R. Part 15.

[31] *See, e.g.,* "A Mystery Heard on Radio: It's Stern's Show, No Charge," New York Times, January 26, 2007 at A17.

XM Radio concerning its terrestrial repeater network. Sirius has engaged in comparable and other technical violations in connection with its terrestrial repeaters.[32]

These violations collectively raise serious questions regarding whether the companies can be relied on in the future to comply with FCC rules or with any conditions imposed or offered as part of the merger. This is particularly the case to the extent that the violations may have been intentional. In this regard, Sirius has admitted that its unlawful receivers were the result of specific requests by its employees to manufacturers.[33]

Against this backdrop of rule violations, allowing XM Radio and Sirius to create a monopoly in violation of the FCC anti-merger rule and decades of communications policy could simply embolden them to pay even less attention to the rules of the road in pursuit of monopolistic profits.

VI. CONCLUSION: AN XM RADIO/SIRIUS MERGER WOULD BE CONTRARY TO THE PUBLIC INTEREST

Accordingly, under FCC precedent, allowing the XM Radio/Sirius merger to proceed would raise very serious legal and public interest questions. The merger would create a monopoly that would undermine competition and harm consumers. In addition, serious questions exist regarding the reliability of the companies to comply with FCC requirements in the future.

[32] *See* FCC File Nos. SAT-STA-20061002-00114 (XM Radio); SAT-STA-20061013-00122 (Sirius).

[33] Sirius Satellite Radio Inc. SEC Form 10-Q at 35 (Nov. 8, 2006) ("certain SIRIUS personnel requested manufacturers to produce SIRIUS radios that were not consistent with these rules.").

The Sirius/XM Merger Should Be Rejected

The Proposed Merger is Anti-Consumer

- ✓ Only Sirius and XM provide a national, multi-channel mobile audio service. No one else, including terrestrial radio, offers a competitive substitute.
- ✓ The relevant market for merger review is SDARS, as defined by the FCC just last month (Satellite Competition Report, Mar. 26, 2007).
- ✓ Allowing Sirius and XM to merge will create a monopoly in the SDARS market, with control over the entire 25 MHz devoted to SDARS.
- ✓ A Sirius/XM monopoly will lead to higher prices, reduced consumer choice and program diversity, and diminished innovation.
- ✓ Sirius and XM could (1) reduce prices, (2) unbundle their channel packages, (3) block and refund adult channels, and (4) unlock exclusive deals with content providers, right now if they wanted. None of the alleged merger benefits are merger-specific.

The Proposed Merger is Anti-Competitive

- ✓ Radio stations do not compete in the *national* mobile market occupied by Sirius and XM, but Sirius and XM do compete for listeners in *local* radio markets.
- ✓ Sirius/XM could cross-subsidize low-cost a la carte offerings and predatory advertising rates with monopoly rents for its national mobile audio services.
- ✓ Sirius/XM could lock up exclusive contracts for sports and other attractive programming, like cable TV.
- ✓ Program producers will suffer as Sirius and XM will no longer have to compete with each other for unique content.

The Proposed Merger Violates FCC and Congressional Policy & Antitrust Law

- ✓ The FCC specifically barred the merger of the two SDARS providers to ensure "intra-market" competition for the benefit of consumers (1997 SDARS Order).
- ✓ A merger would contradict the 1996 Telecom Act policy favoring competition over regulation. Why would the FCC want to create a regulated monopoly?
- ✓ This is worse than EchoStar/DirecTV, which the FCC considered a merger of three competitors into two. Sirius/XM would be a merger to monopoly.

Sirius/XM's Proposed Merger Conditions are Red Herrings

- ✓ Price caps would be temporary, unlike Sirius/XM's monopoly power, which inevitably will lead to future price increases once the caps expire.
- ✓ If past performance is any indicator, Sirius and XM cannot be expected to comply with more regulatory obligations, *e.g.,* still no consumer-friendly dual receiver.

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March 22, 2007

The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Chairman:

On March 20, Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") filed applications for authority to transfer control of their FCC authorizations in connection with their plan of merger announced on February 19, 2007. Local radio broadcasters oppose this proposed merger because it violates the antitrust laws and established FCC rules and policies requiring that such transactions serve the public interest, convenience and necessity. If approved, the merger will create a government-sanctioned satellite radio monopoly. The merged entity will control all of the spectrum now allocated for satellite radio in the United States and coordinated internationally for such use, thereby barring any meaningful competitive entry within the foreseeable future. This merger to monopoly in satellite radio will create an opportunity for widespread abuse of monopoly power to the detriment of consumers, audio content providers, national and regional radio networks, and free over-the-air local radio stations.

As foreseen by the Commission, competition between two satellite radio providers has served consumers well. Each provider has differentiated itself with unique programming and equipment offerings. The loss of competition will halt further innovations in satellite radio service and technology to the detriment of the public.

Sirius and XM tout certain "merger-specific public interest benefits." Without exception, however, all of the alleged benefits would be more likely to occur without the merger in an environment of continued competition. Creation of a satellite radio monopoly is certainly not necessary to realize such benefits.

For example, both of the merger parties are free today to unbundle their channel offerings for subscribers at any time. Unbundling is not a merger-specific benefit. Similarly, the offer of a smaller programming package for less than $12.95 per month is also possible today without a merger.

Moreover, the repackaging of channels from both services into one offering is an illusory consumer benefit because it will result in the elimination of existing channels or formats. The loss of competition in satellite radio ultimately will reduce consumer choice. Such changes and reductions in overall program availability are not merger-specific benefits, and, in the long run, will decrease program diversity.

The hollow promise by Sirius and XM of reduced prices for less overall satellite radio programming is simply not a consumer benefit. Any price concessions offered by the merger parties will clearly be temporary in nature, unlike their monopoly power, which inevitably will lead to price *increases* in the future. As recognized in the 1996 Telecommunications Act and countless Commission decisions, continued competition between two providers is the strongest possible constraint on prices. Moreover, as NAB has previously noted, the fact that XM and Sirius have a long track record of failing to follow FCC requirements casts grave doubts on whether the government could rely on any such promise.

Indeed, one must question whether there is any credible justification for this merger. Sirius and XM claim that changes in the mobile audio marketplace since 1997, when the Commission unanimously rejected a satellite radio monopoly, *alone* justify the wholesale reversal of the Commission's rules requiring competition in satellite radio. However, this is just not so, even under the novel and incorrect definition of the relevant market they propose for purposes of merger review, which is intended to obscure the resulting monopoly in satellite radio. It is simply wrong to equate Internet radio, local AM, FM, and HD radio, MP3 devices, and iPods with satellite radio. While some of these devices may provide one or two parallel features, none resembles XM or Sirius in terms of programming breadth, price, reach and delivery mode. No other audio service is an effective substitute for a national multichannel mobile audio programming service. They cannot be expected to restrain the monopolistic impulses of a united XM-Sirius.

As the Commission recognized when authorizing satellite radio in 1997, national, multi-channel satellite radio would offer services that local radio "inherently cannot provide." There is no doubt that local radio stations compete with other media for the attention of listeners. However, local radio broadcasters do not have a national footprint. Even in the largest urban markets, they cannot offer half as many channels collectively as either one of the current satellite radio licensees, let alone the two combined. Moreover, satellite radio offers a significant amount of content not permitted on broadcast media. The Commission correctly rejected a satellite radio monopoly before the spectrum auction, and it forbade one licensee from ever acquiring the other after the auction. Those restrictions remain in effect today and continue to be justified.

Undoubtedly, a satellite monopoly will cause competitive harm. A satellite radio monopoly would use its monopoly profits from subscription revenue to internally cross-subsidize new offerings and to bolster the satellite radio advance toward advertising revenue from national, regional and local sources. Cross-subsidization will open the door to predatory pricing in advertising markets. That type of unfair competition will harm local radio stations, but more importantly, it will harm the public by eroding the valuable, advertiser-supported programming and services provided by local stations.

A satellite radio monopoly will also thwart program access by other media, especially regional and national radio networks. Exclusivity is already the hallmark of satellite radio programming arrangements. With monopoly power, satellite radio will exclude other media from access to premium sports and entertainment programming. Local stations will suffer and the audiences they now serve will have no choice but to subscribe to satellite radio for certain programming.

Just as the Commission previously rejected a merger of the nation's only two direct broadcast television service providers, NAB urges you to recognize the value of continued competition in satellite radio and the adverse consequences of a satellite radio monopoly. The Commission should gather the detailed facts necessary to evaluate the impact of this proposed merger on the public interest. In particular, the Commission should make a detailed and specific request for information from the merger parties and make such information available to all interested parties.

NAB intends to submit a Petition to Deny the proposed merger at the appropriate time. Until such time, NAB looks forward to discussing these and other issues of concern to local, free over-the-air broadcasters with you and your fellow Commissioners. Please let us know what we can do to assist the FCC in its consideration of these or other matters.

Sincerely,

David K. Rehr

David K. Rehr

cc: Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Mr. Samuel Feder, General Counsel
Ms. Monica Desai, Chief, Media Bureau
Ms. Helen Domenici, Chief, International Bureau

CERTIFICATE OF SERVICE

I, Yvonne Hughes, hereby certify that I have caused copies of the foregoing letter to be served via U.S. Mail on this 22nd day of March 2007, on the following parties listed below:

Mr. Patrick L. Donnelly
Sirius Satellite Radio Inc.
1221 Avenue of the Americas
36th Floor
New York, NY 10020

Ms. Dara Altman
XM Satellite Radio Holdings Inc.
1500 Eckington Place, NE
Washington, DC 20002

STATEMENT

Submitted on behalf of

Common Cause
Consumers Union
The Consumer Federation of America
Free Press
Media Access Project
Prometheus Radio Project

regarding

"The XM-Sirius Merger:
Monopoly or Competition from New Technologies"

before the

Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights

March 20, 2007

Common Cause,[1] Consumers Union (CU),[2] Consumer Federation of America (CFA),[3] Free Press (FP),[4] the Media Access Project[5] and the Prometheus Radio Project[6] urge the Congress, the Federal Communications Commission and anti-trust authorities to hold the line against the growing threat to an increasingly homogenized and concentrated media sector: mergers that concentrate ownership in too few hands. The XM-Sirius Radio merger exacerbates long-standing concerns regarding excessive concentration in the media market and its effects on programmer access and consumer choice. But concerns regarding this merger extend beyond general media consolidation concerns: based on the evidence available today, the proposed transaction is a merger to monopoly in a distinct product market that threatens to increase consumer costs and reduce competition and choice.

The proposed merger of the only two satellite subscription radio companies should raise a red flag for both antitrust officials and communications regulators whose job is to promote competition and consumer choice in the marketplace. Not only were XM and Sirius prohibited from merging as a condition of getting their licenses to use the public airwaves to deliver their services, but also, as demonstrated by the enormous growth of satellite subscription radio service at very substantial monthly charges and consumer equipment costs over just a few years, this service is, in fact, a distinct product and could develop into a vibrant competitive market. We believe the companies who seek to merge so soon after they

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[1] Common Cause is a nonpartisan nonprofit advocacy organization founded in 1970 by John Gardner as a vehicle for citizens to make their voices heard in the political process and to hold their elected leaders accountable to the public interest. Now with nearly 300,000 members and supporters and 36 state organizations, Common Cause remains committed to honest, open and accountable government, as well as encouraging citizen participation in democracy.

[2] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education and counsel about good, services, health and personal finance, and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Report*s, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with more than 5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[3] The Consumer Federation of America is the nation’s largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.

[4] Free Press is a national, nonpartisan organization with over 350,000 members working to increase informed public participation in crucial media and communications policy debates.

[5] Media Access Project (MAP) is a thirty five year old non-profit tax exempt public interest media and telecommunications law firm which promotes the public's First Amendment right to hear and be heard on the electronic media of today and tomorrow.

[6] The Prometheus Radio Project is a non-profit organization founded by a small group of radio activists in 1998. Prometheus Radio Project believes that a free, diverse, and democratic media is critical to the political and cultural health of our nation, yet sees unprecedented levels of consolidation, homogenization, and restriction in the media landscape. The project works toward a future characterized by easy access to media outlets and a broad, exciting selection of cultural and informative media resources.

began competing and offering consumers innovative new services; so soon after they demonstrated that subscription radio is attractive to consumers and could be much more so with consumer-friendly pricing; and in total disregard of the licensing conditions they accepted in order to use public resources, carry an enormous burden to demonstrate why public officials should abandon all normal rules associated with competitive markets and spectrum licensing to allow this merger.

To date, the public has been given no evidence that would support such a showing. Therefore, the Department of Justice (DOJ) and Federal Communications Commission (FCC) should reject this merger unless and until XM and Sirius present clear-cut facts demonstrating how consumers will benefit from less satellite radio competition.

This merger raises the most fundamental issues in antitrust law and poses a substantial threat to consumers and competition. In order to exercise their responsibility under the competition laws, the federal agencies must start from the assumption that the XM-Sirius merger is a merger to monopoly — a merger between the only two firms in the market for national subscription radio service. The product and geographic market characteristics of satellite radio are easily identifiable and quite distinct from other mobile and stationary audio products. It is national, mobile, programmed radio entertainment. The two services deliver and require consumers to purchase huge bundles of well over 100 channels. There are two, and only two, entities providing such a service. The alternatives the companies suggest are substitutes do not possess this set of characteristics and, therefore, cannot be said to compete directly with the service. Entry into this market is restricted by the need to have a license to broadcast at frequencies that enable the service to be provided nationwide. Consumer switching costs are substantial. The original licenses were issued under strict conditions that the two entities are not allowed to merge. There is no circumstance more disturbing from the point of view of the antitrust laws and the Communications Act than a merger within a distinct product market that takes the number of competitors from two to one. Merger to monopoly is antithetical to the competition laws, perhaps the worst offense against the basic principle that competition is the consumer's best friend.

XM and Sirius offer a number of arguments in support of their proposed merger that have not been supported by reliable evidence. We remain unconvinced by the excuses we have heard offered to justify the merger.

The merging parties claim that national subscription radio service competes, indirectly, with a variety of partial substitutes. While AM/FM radio, iPods and other music recording and listening devices can offer similar prepackaged music or local signals similar to what satellite radio offers, none of them can offer immediate national programming, including live professional sports games from across the country to listeners across the nation. The track record of intermodal competition disciplining anticompetitive abuse is poor at best. "Bank shot competition" — the claim that partial or poor substitutes that are fundamentally different than the target product serve as competitors — has failed to protect consumers in similar situations. The result of relying on such competition in both merger and regulatory reviews has been rising prices and stagnation.

A perfect example is cable television. In the 1980s, federal policymakers claimed that cable TV competed with over-the-air broadcasting. Based on that understanding, the FCC deregulated cable systems in communities with three or more broadcast signals. Cable rates subsequently skyrocketed. By the late 1980s, the failure of this intermodal competition to discipline cable pricing was so obvious that the FCC proposed to increase the number of over-the-air stations necessary to represent effective competition to six. Seeing the results of this failed policy, Congress re-regulated cable in the early 1990s, and intervened in the market to help DBS satellite compete against cable (another form of intermodal competition).

In the decade after the Telecommunications Act of 1996, which largely deregulated cable rates, intermodal competition between cable and satellite failed to discipline cable rate increases. Average monthly cable bills have doubled since the 1996 Act. In short, intermodal competition from neither over-the-air TV nor from digital satellite distribution disciplined cable rates. The former had more limited channel capacity; the later had greater channel capacity. It did not matter. The empirical evidence from the cable market is clear. Only head-to-head competition delivers clear relief from anti-consumer, anticompetitive pricing.

In the satellite radio service product space, we face a similar configuration of products. Traditional broadcast radio, digital Internet distribution and mobile handheld devices, like iPods, that allow consumers to store and play music from their own collections or from online music sites, are touted as the intermodal competitors that will discipline prices. Yet there are distinct differences in product quality, listener experiences and mode of delivery. The touted competitors are not national, not mobile or not programmed. The growth in subscribership and revenues for Sirius and XM, based on their SEC 10-5 filings, reinforce the uniqueness of satellite radio's product offerings. Between 2005 and 2006, satellite radio subscribership rose from 9.3 million to 13.7 million — a nearly 50 percent increase. And combined revenue grew by nearly 100 percent. These data are not consistent with a market that competes with the growing market for digital listening devices. Experience and careful analysis suggests that the effort to position satellite radio as merely one product option in a broader product market should be rejected.

Consumers in the satellite radio space are afflicted by the very same pricing practices that afflict consumers in the cable space. Not only are prices high, but also the consumer is offered only large bundles of channels over which they have no choice. Consumer choice and consumer sovereignty are denied. In a product market where the marginal production cost of adding subscribers is almost zero, the bundling strategy is largely anti-consumer.[7] This merger promises to make matters worse, with large capacity systems joining to create larger consumer bundles at higher prices. The merging parties have suggested they may provide consumers greater choice over the channels they pay for if the merger is approved, perhaps by offering tiers of programming. However, it is unclear whether their willingness to hold prices

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[7] The marginal production costs are certainly every low, if not zero, but we are told that the marginal transaction costs (i.e. customer acquisition costs) are high. However, it appears that this problem is a function of the bundling strategy. Having set such a high threshold price, the companies are forced to market aggressively to much narrower market segment.

near current levels does anything more than freeze pricing for yesterday's services. It appears that their promises not to raise prices above the current $12.95/month price for a period of time does not apply to new packages that include the combined services of the two companies – like channel packages that could include Major League Baseball with live NBA basketball and NFL football games. In fact, it is very likely that the "merger benefits" of combining these offerings will require consumers to pay much more than $12.95/month. Yet, in the absence of a merger, it is not clear why prices should not fall far below $12.95/month for existing services if both companies continued to compete against each other and attempted to expand their base of customers.

The merging parties have suggested that post-merger, XM and Sirius subscribers will be held harmless not just on price but also on their current services — that they will receive the same programming they receive now. The purported benefit of the merger is that they will also have the option of receiving additional programming offerings without losing existing channels. Channel capacity will not be a limiting factor, the companies assert, because data compression technology allows them to fit more programming within the same bandwidth. Thus, we're told, XM subscribers would get every channel they get now, plus some Sirius channels, and vice versa. However, many are calling that assertion into question. Coverage of the merger in the March 19, 2007 edition of the *Washington Post* found substantial disagreement whether available technology would allow the companies to add more channels without losing existing channel offerings or degrading audio quality.[8] If that is the case, then there is little consumer benefit to the merger. Consumers seeking content from both providers will need two sets of equipment because dual platform receivers are not yet available. Even when they do become available, it is unclear what they'll cost and whether the parties will offer them to consumers at reduced cost.

The suggestion that free, over-the-air radio will discipline pricing or packaging abuses after the satellite radio firms merge to monopoly, even though it did not restrain their pricing practices up to now is difficult to take seriously. Claims that existing or emerging distribution systems, like cell phones or Internet radio, will discipline the satellite radio monopolists pricing practices are equally suspect. The iPod has been around for a while and has been phenomenally successful, but it sells a very different service and its existence has not disciplined satellite radio pricing practices. There is no reason to believe that it will do a better job if a satellite radio monopoly is allowed to come into existence.

Although the specific product — satellite radio — is new, having been made possible by recent technological advancement, it has achieved a size that establishes it as a distinct product and makes it worthy of public policy attention. Annual revenues exceed $1 billion per year. Abuse of market power in this space could impose a substantial cost on consumers.

Perhaps the most outlandish of all the claims being circulated by the merging parties is the argument that consumers will be better off with a benevolent monopolist than they would be with two competitors. In this ultra-short term view, competition is defined as wasteful,

[8] Charles Babington, "Radio Deal Could Face Technical Difficulties," *Washington Post*, D1, March, 19, 2007.

since redundant facilities lie unutilized. The monopolist can serve everyone while using less resources and the monopolist promises not to abuse the market power that would result. Without the stick of competition, however, the cost savings simply will not be passed through to the consumer. Indeed, the increase in market power will allow the post-merger monopoly to raise rather than lower prices.

The promise of benevolent monopoly is not worth the paper it is written on. The merging parties suggest the merger will increase consumer choice by giving consumers more than the 130 to 170 channels now available to them by consolidating their offerings, omitting the duplicative offerings while retaining highly demanded and niche channels — these are options that consumers can only have to date by subscribing to both services and buying two radios. Yet there is little discussion of the fact that it is the parties' own practices that have denied consumers choice in the past. Despite requirements by the FCC and the terms of their own patent dispute settlement to develop and provide interoperable radios that would have allowed consumers to switch providers without switching equipment, the companies have failed to meet that commitment. Claims by XM and Sirius that they were required only to "develop" the radio, but not to take steps to ensure it was commercially available provides little comfort to consumers denied choice nor should it ease criticism that these parties sought to comply with only the narrowest interpretation of the commitment. Now, we're told dual platform radios are on the cusp of development and will allow consumers to receive both signals simultaneously, easing technological challenges of the merger. But technology that allows consumers to switch services or subscribe to both if they choose should have been available independent of a merger. Yet instead of promoting consumer choice, the merging parties have forced consumers to invest in equipment that works with just one service, and once so invested, they are stuck with that choice.

Greater enthusiasm by the merging parties for interoperable and dual platform radios prior to the merger would have facilitated the very choice they now purport to offer consumers under the merger but *without* the necessity of a merger. It's important to point out that in their discussion of consumer choice, the merging parties fail to consider the loss of choice between the two providers as a meaningful one. The two parties have not, as a matter of business practice, offered consumers the most fundamental choice – which channels to pay for. They stuck with a high-priced, high volume bundle, which is anti-competitive and anti-consumer.

Moreover, under the scant details released to date, it remains unclear what additional equipment costs will be imposed on consumers as a result of the merger and whether, if consumers fail to invest in additional equipment, they will enjoy benefits the parties purport to provide to their subscribers. For policymakers inclined to accept the notion that consumers are better off with one rather than two satellite radio providers, we recommend, that the spectrum occupied by one of the current licenses be divested and made available for other consumer services. If all we need is one satellite radio company, why not auction half of the XM/Sirius spectrum for other commercial uses? Surely a free-market auction would enrich the Federal Treasury with plenty of money to compensate satellite radio subscribers for any sunk equipment costs, offer consumers new broadband or other wireless services, and still enable Sirius and XM to combine their best offerings with substantial channel capacity.

Because this is a unique product market, once the competition is eliminated, prices will rise over time. More importantly, the primary driver of innovation and progress in both programming and technology – competition in the market – will be eliminated. Innovation will slow to the pace preferred by the monopolist and consumers will be much worse off in the long run. This is a Faustian bargain that America rejected over a century ago when we affirmed our commitment to competition by enacting the Sherman Act and later the 1934 Communications Act. The short-term benefit of a monopolist who is subject to political oversight is simply not worth the long-term costs of abandoning the competitive engine of economic progress.

Offers of conditions on the mergers should also be taken with a grain of salt. The recent track record of conditions has been abysmal and the satellite radio industry has already proven that it cannot be trusted to live up to conditions imposed on it. The satellite radio licenses were issued subject to the condition that the licensees never merge. Yet here they are asking to be excused from that condition. The licensees promised to offer the public interoperable radios that would work with both systems. Yet, ten years have passed and there is no such interoperability because the providers narrowly interpreted their obligation. We are told interoperable radios have been developed but are too costly and thus manufacturers will not install them. Yet we have no ability to verify whether the lack of commercial availability of interoperable radios is due to cost, is the result of technical barriers, or instead is a strategic decision to impose barriers to prevent consumers from switching services. In short, from day one they have failed to meet the conditions of their licenses and the public has suffered as a result.

A satellite radio merger to monopoly is about an avalanche of mergers. There was a key moment a decade ago when the Department of Justice decided that a large monopolist is no worse then two smaller monopolists and allowed the Bell Atlantic-NYNEX merger to go forward. That decision opened the door to a wave of mergers that doomed head-to-head competition in telecommunications. The old telephone monopoly was recreated as two huge geographically distinct monopolies that rarely, if ever, compete.

A satellite radio merger to monopoly will perform a similar bellwether function. If the agencies with oversight adopt a loose definition of products and markets and allow a merger to monopoly on the basis of intermodal competition, then a tsunami of mergers could ripple through the digital space at the worst possible moment. The firms that have declared their undying hostility to the open flow of products in the digital economy (broadcasters, telephone/cellular companies, cable companies), will be empowered to capture and stifle the alternatives, under the premise that every media and telecommunications product competes with all others and that new technologies and services will come along to protect the consumer in any case. That relief, however, will be slow and insufficient because the competitive core of the digital economy will have been damaged and the critical terrain of the digital economy will be controlled by entities that have the same anti-competitive, anti-consumer objectives as the merging parties in this case.

We urge the Congress to tell the FCC and antitrust authorities to put the brakes on the proposed XM-Sirius merger unless and until significant questions on competition and consumer impacts are fully addressed and satisfactorily answered. It is time to hold the line against the greatest threat to a competitive and diverse media: mergers that concentrate ownership in too few hands.

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Sirius-XM deal? Get serious

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Barry Saunders, Staff Writer

My last auto mechanic, whose children I put through college, had a sign on his wall that read: "Poor planning on your part does not constitute an emergency on my part."

He'd point to it each time I rushed in and needed some maintenance work done yesterday.

I thought he was being a jerk -- which is why he's my ex-mechanic -- but I think the Federal Communications Commission should put up the same sign and point at it the next time those geniuses at Sirius and XM satellite radio systems request a merger to save money and offset their own bad business decisions.

Paying Howard Stern $500 million is one such bad decision.

When I saw in 2005 that Sirius was paying that shocking sum to shock jock Stern over five years, my first thought was, "Man, did I choose the wrong business."

My second thought was, "Man, I'm glad I have XM and not Sirius, because their rates are going up."

Now that the two companies are seeking a butt-saving merger, though, it appears XM subscribers may wind up pulling Sirius' antennae out of the fire, after all.

The contention of the two companies that a merger would result in lower rates for subscribers is laughable and seems to belie history as well as economic logic: Has there ever been an instance in which a lack of competition benefitted consumers?

Oh, sure, the cable television industry, but name another one. (That's using a literary device called facetiousness.)

We also see how great mergers have been for consumers of terrestrial radio where, because Clear Channel Communications owns 1,200 stations, listeners get to hear the same endlessly insipid, crappy programming and commercials over and over. (Again, facetiousness.)

To those who oppose government intervention in our lives -- unless, of course it's in our bedrooms -- I concede that the U.S. Constitution doesn't guarantee us life, liberty and the right to hear Otis Redding and the Beatles without commercial interruption.

But it should. That is precisely what XM and Sirius promised with relatively low monthly rates. The concept of paying for radio seems ludicrous -- unless you're one of us people who take music-listening seriously and would rather eat a plate of eight-day-old, unrefrigerated collard greens than hear Luther Vandross 20 times a day on your favorite soul station or Kenny G and Michael Bolton anytime anywhere.

I gladly hand over my $14 a month not only so I won't hear that, but also so I can hear Barry White, Inez & Charlie, Steely Dan, the Amazing Rhythm Aces, Richard Pryor and Frank Sinatra without commercial interruption.

While writing this, I am flipping through XM and those are the musical gems playing simultaneously on my six favorite stations.

I'm obviously not the only one who loves satellite radio. CNNMoney reported that both companies are experiencing strong revenue and subscriber growth, but both are losing money.

Don Curtis, president of Curtis Media, which owns, among other things, WPTF-AM in Raleigh, said, "Internet streaming radio will be far less expensive" than satellite radio and won't require all of the expensive equipment. "That'll be a far more practical solution."

Proponents of a merger contend that it would provide customers more options.

That is possible, but both systems already offer more than 100 channels each of music, talk, news and sports: How many more options could one use? Also, how many of Stern's listeners do you think are distressed at the end of his daily broadcast because they are unable to switch stations and hear what Oprah & Friends -- that's the name of her XM channel -- are talking about?

Whether you are a satellite radio subscriber or not, we'll all be singing the blues if the government starts bailing out two companies that made bone-headed business decisions.